IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 353 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

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BHAYJI CHHANAJI ZALA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS RV ACHARYA for Appellant
MR RC KODEKAR, ADDL. PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 17/09/2007

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. The question before this Court, in this appeal directed against the judgement and order passed by the learned Sessions Judge, Ahmedabad (Rural) on 20th March, 1999 in Sessions Case No.18 of 1998, is whether the appellant has been rightly convicted for an offence punishable under section 302 of the Indian Penal Code on the charge of having committed murder by intentionally causing the death of Gemaji Dhulaji on 8.9.97 at any time prior to 4:30 in the morning as he had harboured the suspicion that the deceased was having illicit relations with his paternal uncle’s daughter.

2. The case of the prosecution is that the first informant Melaji Gemaji, had lodged a complaint with the Kanbha Police Station on 8.9.1997, stating that about a week prior thereto, in the evening, one Bhaiji Shanaji Jhala (the appellant herein) and his friend Manaji Javaji Jhala were standing in the narrow lane next to their house and had threatened his father that as he was not letting Madhi go to her in-laws’ house, within a week they would cut him. At that time he had come out of his house to go to the village and on seeing him, both of them had also taunted him. He and his father had not lodged any complaint in this regard, and on the previous day i.e. 7.9.1997, at about 8 o’clock at night his father had gone to the bhajan at Badaji Sadaji’s place and had returned home at

about 3:30 a.m. and had slept in the courtyard. Approximately between 4 to 5 a.m., Bhaiji Shanaji Jhala had come with his friend Manaji Javaji Jhala and dealt a blow with a dharia on the neck of his father Gemaji Dhulaji (hereinafter referred to as “the deceased”) and by injuring him caused his death. At that time his father had shouted, whereupon he had come running outside the house. He has seen Bhaiji Shanaji with a dharia whereas Manaji was standing with him nearby. On seeing him both of them had fled.

3. The complaint was recorded on 8.9.97 at 8:30 hours, in the presence of PW 6 Rampalsinh Kamalsinh Choudhary, Senior Police Sub-Inspector, Kanbha Police Station and the same was registered as Kanbha Police Station I C.R. No.114/97 for the offences punishable under Section 302 read with section 120B of the Indian Penal Code. Thereafter, the said officer took charge of the investigation and proceeded to the place of occurrence at Bhatpura village. He held the inquest on the dead body of the deceased and drew a panchnama accordingly, in the presence of panchas (Exh.12). The dead body was sent for post mortem examination to the Government Hospital. Thereafter he drew the panchnama of the scene of offence (Exh.11) in the presence of panchas and recorded statements of the concerned persons. On the same day in the evening the accused were arrested.

4. On 9.9.97, a dharia and clothes were discovered at the instance of the appellant and the same were seized by drawing a panchnama in the presence of panchas (Exh.14). The muddamal articles were sent to the Forensic Science Laboratory for analysis along with the forwarding report (Exh.22). On conclusion of the investigation, as there was sufficient evidence against the accused, charge sheet was submitted before the learned Judicial Magistrate First Class, Third Court, Mirzapur, Ahmedabad in Criminal Case No.3497 of 1997 on 4.12.1997.

5. As the offence under section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions, the learned Magistrate vide order dated 22.1.1998 committed the case to the Sessions Court, Ahmedabad (Rural), Mirzapur, Ahmedabad, under section 209 of the Code of Criminal Procedure, 1973 (in short “the Code”) where it was numbered as Sessions Case No.18/98.

6. The learned Sessions Judge framed Charge against the accused for offences punishable under sections 302 and 120B of the Indian Penal Code at Exhibit 3. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and prayed for trial.

7. To establish the charge against the accused, the prosecution examined the following six witnesses:

PW-1 Melaji Gemaji, who is the son of the deceased has been examined at Exh.7 as an eyewitness.

PW-2 Javanji Budhaji Sodha (Exh.10) is a panch of the “Scene of Offence Panchnama” (Ex.11) as well as the “Inquest Panchnama” (Exh.12).

PW-3 Mukeshkumar Keshavlal Trivedi (Exh.13) is a panch of the “Discovery Panchnama” (Exh.14)

PW-4 Kamuben Dhuraji who is the sister of the deceased has been examined at Exh.19 as an eyewitness.

PW-5 Dr. Rameshchandra Bhagubhai Shah(Exh.20) is the Medical officer who has conducted the autopsy on the dead body of the deceased.

PW-6 Rampalsinh Kamalsinh Choudhary who is the Investigating Officer in the present case, has been examined at Exh.23.

8. The prosecution has also proved and relied upon the following documentary evidence:

1. F.I.R. Exh.8
2. Panchnama of the scene of offence. Exh.11
3. Inquest panchnama. Exh.12
4. Discovery Panchnama. Exh.14
5. Panchnama of the clothes of the deceased. Exh.15
6. Panchnama of physical condition and arrest of the accused. Exh.16
7. Post Mortem Report. Exh.21
8. Forwarding report to F.S.L. Exh.24
9. F.S.L. letter acknowledging receipt of articles for analysis. Exh.25
10. F.S.L. forwarding letter along with analysis report. Exh.26.
11. Serological Report. Exh.27

Out of the aforesaid eleven documents, the documents at Exh.15 and 16 were admitted by the defence and were, accordingly, exhibited.

9. At the end of trial the incriminating circumstances appearing in evidence against the accused were put to them and their statements were recorded under section 313 of the Code. The defence of the accused was in the nature of denial. The defence neither led any evidence nor examined any witnesses.

10. The learned Sessions Judge, at the end of trial, after hearing the learned Advocates appearing on behalf of the respective parties and appreciating the evidence on record,

acquitted accused No.2 Manaji Jawanji of the charges levelled against him. Insofar as the appellant Bhaiji Shanaji Jhala is concerned, the learned Sessions Judge came to the conclusion that the prosecution had failed to establish the charge under section 120B IPC against him and acquitted him of the said charge. However, insofar as the charge under Section 302 IPC is concerned, the learned Sessions Judge found that the prosecution had successfully established the same and accordingly convicted the appellant for the offence punishable under section 302 IPC and sentenced him to suffer imprisonment for life, which has given rise to the present appeal under section 374 (2) of the Code.

11. Assailing the impugned judgement and order, learned Advocate Ms. Rohini Acharya had submitted that there were material discrepancies in the evidence of the eyewitnesses as to the time when the deceased returned home and as to when the accused had fled from the scene of offence, which shake the credibility of the said witnesses. It was submitted that there were material contradictions in the evidence of PW-4, hence her testimony is neither credible nor reliable and as such deserves to be discarded. Moreover, both PW-1 and PW-4 are closely related to the deceased and as such are interested witnesses. It was submitted that though it is true that

considering the time of the incident, no independent witnesses would be available, but in their testimony the so-called eyewitnesses have stated that one Punaji Vajaji and Shardaben had come to the scene of offence when they had raised shouts. Hence, the prosecution ought to have examined the said persons as witnesses, they being independent witnesses. It was accordingly submitted that the prosecution has failed to examine any independent witnesses, which raised a doubt against the prosecution case. It was also contended that the prosecution has failed to establish the motive behind the commission of the offence. It was urged that the prosecution has failed to establish the charge against the accused beyond reasonable doubt, therefore, the appeal be allowed and the order of conviction and sentence passed against the appellant be set aside and the appellant be acquitted.

12. As against that the learned Additional Public Prosecutor Mr. R.C. Kodekar submitted that the prosecution had examined two eyewitnesses who had actually witnessed the incident. There were no material contradictions in their evidence. The medical evidence as well as the circumstance of discovery of the weapon used in the commission of the offence and the clothes worn by the appellant at the relevant time at the instance of the appellant, further corroborate the evidence of these witnesses.

These circumstances are further corroborated by the FSL report wherein, blood of group “B” i.e. the blood group of the deceased has been found on the dharia as well as the clothes of the appellant. It was submitted that the prosecution had established the charge against the appellant beyond reasonable doubt and as such the impugned judgement and order is required to be confirmed and the conviction and sentence deserves to be maintained by this Court.

13. We have considered the submissions advanced by Ms. Rohini Acharya, learned advocate appearing on behalf of the appellant and Mr. R.C. Kodekar, learned Additional Public Prosecutor for the respondent State of Gujarat. We have also undertaken a complete and comprehensive appreciation of all the vital features of the case and the entire evidence on record, which has been read and re-read by the learned advocates for the parties with reference to the broad and reasonable probabilities of the case.

14. In the background of the facts stated hereinabove, we are required to examine as to whether the appellant is the author of the crime in question.

15. Insofar as the death of the deceased being a homicidal one, the defence has not disputed the same even before the trial Court. Nevertheless,

the prosecution has successfully established that the death of the deceased was a homicidal one through the evidence of PW-5, Dr. Rameshchandra Bhagubhai, the Medical Officer who had conducted the autopsy on the dead body, read with the post mortem report and the inquest panchnama. As per the post mortem report, the deceased had sustained the following external injuries:

> *"Incised wound present on the (Rt) side of neck "D" shaped 19 cm. x 5 cm x Bone deep. Both edges are sharp cutting and both angles are acute. All the structure at (Rt) side of neck are cut i.e. skin, subcutaneous tissue, sterno-cleidomastoid muscle, Trapezius muscle, External Jugular vein, Carotid artery and C7 vertebra transversely cut, Blood clot present at places*."

On internal examination, the C-7 vertebra was found to be transversely cut. In the opinion of the Medical Officer, all the injuries were antemortem and the cause of death was due to haemorrhage as a result of the injury sustained on the neck. This evidence is sufficient to arrive at the conclusion that the death of the deceased was a homicidal one. Hence, we agree with the finding recorded by the trial Court that the deceased died a homicidal death and confirm the said finding.

16. Now comes the moot question, as to whether the prosecution has succeeded in establishing the culpability of the appellant in respect of the charge levelled against him.

17. As per the prosecution case, PW-1 and PW-4 are eyewitnesses who have actually witnessed the incident. Hence, the testimonies of the two eyewitnesses, who are also happen to be closely related to the deceased, are required to be carefully scrutinised.

18. PW-1, Melaji Gemaji is the son of the deceased and has been examined at Exh.7. According to this witness the incident had taken place on 8.9.97. One week prior to the incident the appellant, Bhaiji Shanaji and Manaji Javanji were threatening to kill his father. On the day of the incident at 8 o'clock at night his father had gone to the bhajan arranged at the house of Badaji Sadaji in the village. When his father returned home, his sister's daughter was crying, therefore, his father told his aunt (father's sister) to keep her quiet and after saying so he went to the cot outside and lay down. At that time both, the appellant and Manaji Javanji, had come to his father's cot and the appellant had dealt a blow with a *dharia* on the neck of his father. When the appellant dealt the blow, his father had only uttered "Oh". After that he, his aunt and his sister reached near his father. The appellant and Manaji Javaji were standing there, thereafter all three of them had raised shouts, whereupon Punaji Vajaji and his wife Shardaben who were residing next door, had come there.

Thereafter the appellant and Manaji Javaji had run away. This witness had further deposed that subsequently many people had gathered there. The appellant's mother Chanchiben had come to inquire about his father, and after some time Manaji Javaji, who was fully drenched, had also come there. His aunt has asked Chanchiben as to why she had come there, when it was the appellant who had struck her brother with a *dharia*. Thereafter both Chanchiben and Manaji had run away. This witness has also deposed that his father's cot was in the courtyard and the cots of all three of them, were on the *osari* (verandah) and that the lights were switched on in the house. He has further stated that he had gone to the police and registered a case and has also acknowledged his signature as well as the contents of the First Information Report,* which has been produced at Exh.8. According to this witness Madhuben, who is the daughter of Bhaijiji's paternal uncle, had illicit relations with his father and that this incident had taken place because of suspicion regarding such an illicit relationship. In his cross examination he has repelled the suggestions put to him that he was not awake when the incident had taken place; that the lights were put off; that his sister and niece were sleeping in the inner room; that his father's cot could not be seen from his cot. Despite lengthy cross-examination the defence has not been able to shake the credibility of

this witness. The First Information Report Exh.8 lodged by him at the police station also duly corroborates his testimony.

19. The prosecution case is further fortified by the testimony of PW-4 Kamuben Dhuraji who has been examined at Exh.19, which corroborates the testimony of PW-1. According to this witness, the deceased was her brother and at the relevant time she was residing at Bhatpura. She has stated that the incident had taken place approximately one and a half years prior to the recording of her evidence and at the time of the incident she, Kailashben and her nephew Melaji were on the *osari*. Kailash’s daughter was crying so they were all sitting on the *osari*. While they were sitting there, her brother Gemaji had returned from the *bhajan*. He had gone for the *bhajan* at 8 o’clock at night. After returning from the *bhajan*, her brother had some water and told them to put the girl to sleep and said that he was going to sleep. Her brother went to sleep on a cot, which was at a short distance from the *osari*. After, he had fallen asleep, the appellant and Manaji had come and the appellant had dealt a blow with a *dharia* on the neck of her brother, therefore, they all had come running there and raised shouts due to which the public had gathered there and the appellant and Manaji had fled. She has identified both the accused in the court. This witness had further deposed that

the appellant's mother had come and told that her son had not inflicted the *dharia* blow, in reply to which she had told her to get out from her sight, saying that she had seen the appellant inflict the blow with the *dharia*. She has stated that thereafter, Manaji had come; he had bathed in the lake and come. Manaji had said that he would go and call his father's sister to which she had told him not to do so. She has also stated that a week prior to the incident on Sunday both the accused were talking about killing her brother. According to this witness, as both the accused were harbouring the suspicion that her brother had illicit relations with Madhu, this incident had taken place. This witness has also been cross-examined at length however; nothing worthwhile has been elicited to corrode the credibility of the witness. In her cross-examination she has emphatically denied the suggestion that when the incident had taken place the lights had been switched off. From her cross-examination it has come out that they were awake as the child was crying. They were sitting on their cots and the lights were on. She has denied the suggestion that Manaji had a *dharia* in his hand, but has categorically stated that it was the appellant who had a *dharia* in his hand. She has also stated that she does not remember as to in which hand the appellant was holding the *dharia*. On an overall view, the evidence of this witness is cogent, clear and very natural.

20. On reappraisal of the evidence of these two witnesses, according to us, the prosecution has clearly established that the deceased had gone to attend the *bhajan* in the village, at about 8 o’ clock at night and had returned at about 4 o’clock in the morning. At that time Kailashben’s daughter was crying, hence, it is natural that they were all awake. After coming home the deceased had some water and went to sleep after telling them to quieten the child and put her to sleep. Almost immediately thereafter the appellant along with his friend had come there and inflicted a blow on the neck of the deceased with a *dharia*. These witnesses and Kailashben immediately ran there and saw the appellant and his friend standing there. On their raising shouts, the appellant and his friend ran away. Since the child was crying and the witnesses were awake, it is but natural that they must have put on the lights. Moreover, as they knew the accused, there was no question of any misidentification. The evidence of both these witnesses is cogent and credible. There are no material discrepancies in either of their testimonies. Their presence at the scene of offence is natural. From their testimonies it is apparent that they have not tried to implicate the accused falsely as neither of them have attributed any overt act to Manaji. The testimonies of both these witnesses have a ring of truth and appear to be

trustworthy and reliable.

21. The evidence of the two eyewitnesses finds further corroboration in the testimony of PW-5, Dr. Rameshchandra Bhagubhai Shah. In the opinion of this witness the injuries sustained by the deceased were ante mortem and could be caused by the muddamal article No.11, *dharia*. This witness has also deposed that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death and that the cause of death was due to shock and haemorrhage as a result of the injury sustained on the neck. The evidence of this witness, buttresses the say of the witnesses that the appellant had inflicted a blow with a *dharia* on the neck of the deceased.

22. The testimonies of the two eyewitnesses are also corroborated by the scene of offence panchnama, Exh.11 which has been duly proved through the testimony of the panch PW-2 Jawaji Budhaji Sodha. A perusal of the said panchnama shows that the place where the offence was committed is at a distance of seven feet from the *osari* of the house of the complainant on which the cots of the eyewitnesses were located. Hence, there is no reason to disbelieve the say of the witnesses that they had witnessed the incident.

23. The prosecution case gets further support from

the circumstance of the recovery of the weapon used in the commission of the offence as well as the clothes worn by the appellant at the relevant time at the instance of the appellant, under the provisions of section 27 of the Evidence Act. The discovery panchnama (Exh.14) has been duly proved through the testimony of PW 3 who is the panch witness and has fully supported the case of the prosecution. In the panchnama it has been recorded that the accused Bhaiji Shanaji Jhala had shown willingness to produce the weapon used in the commission of the offence, as well as the clothes that he had put on at the relevant time, which he had concealed. Hence a preliminary panchnama was drawn. Thereafter they had gone in a Government vehicle and the appellant was showing the way. Thereafter as per the instructions of the appellant they had stopped and alighted from the vehicle. The appellant had walked ahead and had recovered clothes and a bloodstained *dharia* from behind a hedge in an agricultural field. Both the articles were sealed in their presence. This area is at a close distance from Bhatpura village and is located behind the appellant’s residence.

24. The Analysis and Serological reports of the Forensic Science Laboratory produced vide Exh.27 lend further support to the prosecution case. According to the said reports, bloodstains of group ‘B” which is the blood

group of the deceased have been found both on the *dharia* as well as the shirt of the appellant which have been recovered under the discovery panchnama.

25. Ms. Acharya, learned advocate for the appellant has contended that the prosecution has not examined any independent eyewitnesses, more particularly Punaji Vajaji and his wife Shardaben who are stated to have arrived at the scene of incidence immediately, which creates a doubt regarding the truthfulness of the prosecution case. The said contention does not merit acceptance as neither of the said witnesses are eyewitnesses, hence, non-examination of the said witnesses cannot be said to be fatal.

26. The contention that the prosecution has not proved the charge against the appellant as it has failed to establish the motive has to be stated to be rejected. It is well settled in criminal law that motive is not very material in a case of direct evidence but it is very important in a case of circumstantial evidence. As the present case is one where there is direct evidence in the form of testimonies of eyewitnesses, the motive behind the commission of the offence pales into insignificance.

27. Considering the overwhelming evidence on record, we are of the view that the only

possible conclusion that can be arrived at is that the appellant is the author of the crime in question. We are, accordingly satisfied that there is no infirmity in the reasons assigned by the learned Judge of the trial Court for holding the appellant guilty of committing murder of the deceased.

28. In the above view of the matter we are of the clear opinion the trial Court was fully justified in convicting the appellant for the offence punishable under section 302 of the Indian Penal Code and find no merit in this appeal. The appeal being devoid of any merit or substance deserves to be dismissed and is, accordingly, dismissed. Resultantly, the impugned judgement and order of conviction and sentence is hereby confirmed and maintained.

[A.M.KAPADIA, J.]

[HARSHA DEVANI, J.]

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